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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-406

JOSEPH BARNETT DOMINEY, JR.,
Petitioner,

versus

LOUISE ELLEN DOMINEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To The Court Of Civil Appeals For The Eighth Supreme Judicial District of Texas, Sitting At El Paso

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JOSEPH BARNETT DOMINEY, JR.,
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TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

By this Petition, Joseph Barnett Dominey, Jr., respectfully seeks a writ of certiorari to review the judgment and opinions in this case of the Texas Court of Civil Appeals at El Paso.

I. OPINIONS OF THE COURTS BELOW.

The trial court, the Court of Domestic Relations for Midland County, Texas, did not render an opinion. A

copy of the judgment and opinion of the Court of Civil Appeals on original submission is appended hereto as Appendix "A", and a copy of its order and opinion on motion for rehearing is appended hereto as Appendix "B". Both are reported in 481 SW 2d 473.

II. JURISDICTIONAL STATEMENT.

The Court of Civil Appeals rendered its original judgment and opinion on April 19, 1972. It modified it on June 14, 1972, when it entered its order overruling Petitioner's motion for rehearing. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C., Section 1257(3).

The judgment of the Court of Civil Appeals is a final judgment. Because this is a divorce case, under Article 1821, Revised Civil Statutes of Texas, 1925, the Court of Civil Appeals is the highest court of the State of Texas in which a decision in this case could be obtained. In the courts below, Petitioner specially set up and claimed the right, title, privilege and immunity in controversy under the Constitution and statutes of the United States.

III. QUESTION PRESENTED FOR REVIEW.

Whether Texas law, which would include entitlement to Navy disability retirement pay as marital property subject to division between spouses on divorce, conflicts with United States law, and, because of the Supremacy Clause in the Constitution, must yield thereto.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES.

The Constitutional provision involved in this case is the Supremacy Clause of the Constitution of the United States, Article 6, Clause 2, reading:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The statutes involved in this case, all of which are set forth verbatim, together with the official citations thereof, in Appendix "C" appended hereto, are:

Texas Family Code, Section 3.63
10 United States Code, Section 1201
Section 1202
Section 1401a(b)
Section 1403
Section 1431
Section 1434
Section 1435
Section 1440
26 United States Code, Section 104
38 United States Code, Section 3101
Section 3105
Section 3107

V. STATEMENT OF THE CASE.

By this suit, Louise Ellen Dominey obtained a divorce from Petitioner, and a division of property which included, as though it were property subject to division, amounts which may be paid to Petitioner after the divorce, either as Navy disability retirement pay or Navy retirement pay (Judgment, TR 39-43).

The parties married in 1937 (SF 5). Thereafter, Dr. Dominey went to the University of Texas Medical School, from which he graduated in 1942 (SF 6). He then went into the Navy as a commissioned medical officer (SF 6) and served as such until about October 1, 1966, when he retired (SF 7).

On October 1, 1966, Petitioner was eligible to receive retirement pay for voluntary retirement based on longevity of 24 years. On that date, however, he was involuntarily retired from the Navy with disability retirement on account of a heart condition and other health problems, none of which are ascribed to any accident or other specific event. (Stipulation of Facts filed in Court of Civil Appeals).

At the time of trial, Petitioner was receiving disability retirement pay from the United States and he has continued at all times since to receive disability retirement pay (Stipulation of Facts filed in Court of Civil Appeals). At the time of trial (TR 39), Dr. Dominey was receiving $936.00 per month as tax free Navy disability retirement pay, the amount of which becomes adjusted from time to time with changes in the cost of living (SF 16-17).

The trial court treated whatever payments Dr. Dominey might receive in the future either as Navy disability retirement pay or as Navy retirement pay as property which was subject to division between spouses on divorce. In detailed judgment provisions, the trial court enjoined Dr. Dominey to insure that Mrs. Dominey would in fact, receive a 50% share of the retirement payments the United States might pay in the future to Dr. Dominey (Judgment TR 41-43). The trial court also made division between the parties of monies and properties on hand (Judgment, TR 40-41).

Petitioner first raised the federal question sought to be reviewed in the trial court in his Motion for New Trial (TR 47-51) which he presented to, and which was expressly overruled by, the trial judge (TR 53). He raised it again in the Court of Civil Appeals in his "Statement of Points of Error Upon Which the Appeal is Predicated". The Court of Civil Appeals met the issue and concluded that the Texas law does not conflict with federal law. The pertinent portions of the Motion for New Trial filed in the trial court, the order overruling the same, and Petitioner's "Statement of the Points of Error Upon Which the Appeal is Predicated" are included in Appendix "D" appended hereto.

VI. REASONS FOR GRANTING THE WRIT.

The Texas Court of Civil Appeals has decided a federal question of substance which has not been passed upon by this Court.

The problem arises again and again, as marriages of active and retired servicemen are terminated, either by death or divorce. Whether former spouses of active or retired servicemen, their heirs, legatees, personal representatives, assignees or creditors, may have State created vested property rights in that which, under present Congressional enactments, the United States may hereafter pay its retired servicemen, needs deciding by the highest authority. Such a decision is important not only to present and prospective servicemen and retired servicemen, but as well to the components of the Armed Forces of the United States and the Congress which is charged with devising the means of raising and supporting Armies and providing and maintaining a Navy.

VIII. ARGUMENT.

A State may not now lawfully redesignate the objects of the bounty which the United States chooses to afford its retired servicemen and certain of their spouses and dependents.

Under Texas law, declared in *Busby vs. Busby* (Tex. S. Ct., 1970), 457 SW 2d 551, followed in this case, future retirement payments which the United States may make to its servicemen are considered property in which the servicemen's spouse may have a vested property right which may be divided on the occasion of divorce of the spouses, and, presumably, the death of one of the spouses. This fails to reckon, however, with the Supremacy Clause of the Constitution of the United States, Article 6, Clause 2, as enforced in such cases as *Free vs. Bland* (1962), 369 U.S. 663, 8 L. ed.

2d 180, 82 S. Ct. 1089, reversing a Texas Supreme Court decision which gave effect to the Texas law limiting the right of survivorship in Government Series E Bond situations, and *Wissner vs. Wissner* (1950), 338 U.S. 655, 94 L. ed. 424, 70 S. Ct. 398, dealing with the ineffectiveness of state property law on National Service Life Insurance policies and benefits.

At the present time, the United States has fairly elaborate provisions for payments to retired servicemen. It has chosen in some instances, not here applicable, to provide options exerciseable by servicemen for the benefit of spouses and other dependents, and in so doing, it has chosen, in the other instances, not to so provide for spouses or dependents. It affords tax advantages in some retirement situations and exemptions in other circumstances from claims of creditors. Congress has not chosen to bind the United States to any future duties to provide benefits for its veterans. The only mandate is the Constitutional mandate on Congress to raise and support Armies and to provide and maintain a Navy, under the Constitution, Article 1, Section 8, Clauses 12 and 13.

Chapter 61 of Title 10, United States Code (particularly Sections 1201 and 1202), provides for retirement of members of the Armed Forces for physical disability, Chapter 63 of Title 10, United States Code, pertains to retirement for age, and Chapter 65 of Title 10, United States Code, talks of retirement for length of Service. Chapter 71 of Title 10, United States Code (see particularly Sections 1401a(b) and 1403), deals with computations of amounts of retirement pay. 10 United States

Code, Section 1403, and 26 United States Code, Section 104, makes disability retirement pay tax free. Chapter 73 of Title 10, United States Code (particularly Sections 1431, 1434, 1435 and 1440), treats of servicemen's optional family retirement payments and annuity elections based on retirement pay, who may be eligible to receive the same, and the times for elections to be made if an annuity is chosen Under 38 United States Code, Section 3105, retired members of the regular components of the Armed Forces are entitled to elect to take disability benefits administered by the Veterans Administration in lieu of retirement pay. Chapter 53 of Title 38, United States Code, and particularly Section 3101 thereof, provides that Veterans Administration payments are not assignable except as specifically authorized by law, and are exempt from claims of creditors, attachments, levy and seizure under legal or equitable process. Section 3107 of Title 38, United States Code, directs how Veterans Administration payments are to be apportioned among wives, children and dependent parents under certain circumstances.

By its current enactments, as of the first of the year, 1971, Congress ordered that persons like Petitioner would be paid by the United States, $993.35 per month. It said that amount shall be adjusted from time to time in accordance with the Consumer Price Index published by the Bureau of Labor Statistics, 10 United States Code, Section 1401a(b). To the extent such payments are based on percentage of disability, and in this case, all, (SF 16-17), Congress says such are to be treated as an allowance for personal injury or sickness, resulting from active service in the Armed

Forces, under Section 104 of Title 26, United States Code, i.e., tax free. United States Code, Section 1403. If desired, Congress said that those with disabilities instead may elect to take like amounts of Veterans Administration benefits that are exempt from attachment, levy and seizure under legal or equitable process. 38 United States Code, Sections 3105 and 3101. Congress said that those like Dr. Dominey can affirmatively elect to receive an annuity (10 United States Code, Section 1431) of certain specified types and amounts in favor of his surviving spouse, until death or remarriage, *or* surviving eligible children, or his surviving spouse, until death or remarriage, *and* surviving eligible children, as the retiree might select (10 United States Code, Section 1434). These annuities are not assignable or subject to execution, levy, attachment, garnishment or other legal process (10 United States Code, Section 1440). To the extent that Veterans Administration payments might have been elected by Dr. Dominey, Congress said the pension amount may be apportioned among wife, children and dependent parents, according to regulations of the Veterans Administration, if the veteran is being furnished hospital treatment, or institutional or domiciliary care by the United States, or by any political subdivision thereof.

The State of Texas, on the other hand, says that if there is a Texas divorce of a member of the Armed Forces, such types of payments made in the future by the United States will be paid over to the divorced wife in such portions and amounts, up to 100% as the divorce court deems just and right, having due regard for the rights of each party and any children of the

marriage (Section 3.63, Texas Family Code). If the occasion is death instead of divorce, and if all or any part of the entitlement to future payments from the United States is deemed community property of the spouses, then one-half of the community property portion of such entitlement would pass the heirs and legatees of the deceased spouse, to be subject to assignment by them, and, presumably, to attachment, levy and seizure under legal or equitable process. It is not too farfetched under legal or equitable process. It is not too farfetched to conceive that in the case of either death or divorce, all or part of the serviceman's pension would become payable to the retiree's mother-in-law or brother-in-law, their assigns, or their creditors, and that Dr. Dominey, and others similarly situated, his surviving spouse, if any, and/or his eligible children, if any, might be unable to have or to keep the same.

In an effort to avoid the confict between state and federal law, the trial court, recognizing that Dr. Dominey's wife has no right to receive from the United States any part of Dr. Dominey's future Navy pay, proceeded to impress a trust on one-half of such payments for the use and benefit of Mrs. Dominey, and enjoined Dr. Dominey to act accordingly. This technique was used at least once before by Texas courts to avoid conflict of federal law with state law, involving the validity of joint tenancies with right of survivorship in United States Series E Bond. This technique this Court saw through and condemned, as it would any mere subterfuge, in *Free vs. Bland* (1962), 369 U.S. 663, 8 L. ed. 180, 82 S. Ct. 1089.

In *Wissner vs. Wissner* (1950), 338 U.S. 655, 94 L. ed. 424, 70 S. Ct. 398, the Supreme Court had before it questions about the effect of state law on ownership and benefits of National Service Life Insurance, a creature of federal law. State law would have treated a National Service Life Insurance policy as community property in which a serviceman's spouse had vested rights. This Court held that Congress had created National Service Life Insurance and had specified who was to have the same, the amount, limits, costs, objects of the bounty, etc., and that conflicting state law had to yield to the federal law by virtue of the Supremacy Clause of the Constitution, Article 6, Clause 2. In this case, we have the corresponding situation in the area of other servicemen's benefits, namely Navy Disability Retirement Pay and Navy Retirement Pay, annuity elections thereunder, and perhaps elected benefits payable by the Veterans Administration.

Congress has afforded no one, not even retired servicemen themselves, property rights in payments which Congress from time to time chooses to pay. Texas law says there are such property rights, that they are vested and that spouses and those claiming through and under them may also have vested property rights therein. This is a conflict which needs to be resolved. Congress has allowed a serviceman and retired servicemen to make various elections for the benefit of themselves and specified persons which Texas law would abrogate if they were not in the best interest of the retiree's spouse and those claiming under him. This is another conflict that needs attention. The most far reaching conflict, however, is in the fact that Con-

gress has specified with particularity who the objects of the bounty of the United States shall be, while the State of Texas has said that the object of such bounty, at least in part, may be others. While Congress might someday want to take care of divorced spouses of servicemen and those claiming by and through them, it has so far declined to do so, and it is not for the State of Texas to direct that which the Congress has so far declined to do.

CONCLUSION

For the reasons stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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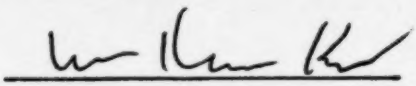
CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this 7th day of September, 1972.



APPENDIX

APPENDIX "A"

Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso

JOSEPH BARNETT DOMINEY, JR.,
Appellant,

versus No. 6209

LOUISE ELLEN DOMINEY,
Appellee.

Appeal from the Domestic Relations Court of Midland County, Texas
Date of Entry: 4-19-72

OPINION

This was a suit for divorce brought by Plaintiff-Appellee, Louise Ellen Dominey, against Defendant-Appellant, Joseph Barnett Dominey, Jr. The jury found that Appellee had grounds for divorce, and both parties agreed to allow the trial Court to decide all issues pertaining to the character and division of property within the marital estate. Appellant has appealed only that part of the judgment giving Appellee one-half interest in all future retirement benefits accruing to Appellant by virtue of service in the U. S. Armed Forces.

The record reflects Appellant and Appellee were husband and wife during the entire period of Appellant's

military service, and they were residents of Texas during such period of time; that Appellant entered the U. S. Navy in 1942; and that Appellant retired from the U. S. Navy in 1966. Thereafter, Appellee filed this suit for divorce.

Appellant contends that Texas law which would include entitlements to Navy Disability Retirement Pay and Navy Retirement Pay as marital property subject to division between spouses on death or divorce, and which would treat periodic payments thereof as outside the Texas ban on permanent alimony, conflicts with United States law, and must yield thereto under the Supremacy Clause of the Constitution of the United States, Article 6, Caluse 2. As this issue has been previously disposed of by the Texas Supreme Court, we hold in accordance with the decision of Busby v. Busby, 457 S.W.2d 551 (Tex. 1970). In that case the Supreme Court discussed and approved the cases of Kirkham v. Kirkham, 335 S.W.2d 393 (Tex.Civ.App. 1960, n. w. h.): Webster v. Webster, 442 S.W.2d 786 (Tex.Civ.App. 1969, n. w. h.); and Mora v. Mora, 429 S.W.2d 660 (Tex. Civ. App. 1968, writ dism'd), holding that an interest in a military retirement plan was an earned property right which accrued by reason of the husband's military service, and that the portion earned during marriage constitutes community property under Article 4619, Vernon's Ann.Tex.Civ.St. Appellant urges that this ruling of the Supreme Court was made without consideration of its conflict with Federal law and thus is not controlling here. We do not agree with that contention, and accept the cited cases as controlling here. We are of the further opinion that there is not a clear-

cut case of conflict in the record before us; that the nature of the retirements is not so spelled out as to dictate who is to receive them and to remove them from Court control. This case thus differs from Free v. Bland (1962), 369 U.S. 663, 82 S. Ct. 1089, 8 L.Ed.2d 180, and Wissner v. Wissner (1950), 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424, relied on by Appellant. Appellant also cites Ramsey v. Ramsey (Tex. Civ.App. — Eastland, 474 S.W.2d 939, writ applied for Feb. 1972), holding that disability payments of the husband paid to him by the Veterans Administration after the divorce for service-connected disabilities were his separate property. The Court distinguished the case from Busby v. Busby, supra, saying:

> "In the instant case the payment to Ramsey was not an earned property right which accrued to him by reason of his years of service in military service, but was for personal injury or disease to him for service-connected disability. There was no obligation or promise by the Veterans' Administration to remunerate Ramsey for his service-connected disabilities."

In the case before us, the husband and wife, contributed to his earning of the promised retirement throughout the years of his service as a career military man. The payment was earned by the husband's service and was not payment for a disabling personal injury. The judgment recites:

"It further appears, and the Court so finds, that, on account of the defendant's service in the United States Navy, all of which service occurred while the defendant was domiciled in Texas, the defendant is entitled to receive from the United States government U. S. Navy retired, and/or disability retired, pay benefits, (hereinafter called "Navy retired pay", whether referring to regular or non-disability, retired pay benefits or to disability retired pay benefits.)"

The judgment speaks of "disability," but there is no contention that the Appellant was disabled, and the evidence simply is that when he got out of the Navy he began receiving retirement pay.

All points of error have been considered, and all are overruled. The judgment of the trial Court is affirmed.

/s/ STEPHEN F. PRESLAR
STEPHEN F. PRESLAR,
Associate Justice.

APPENDIX "B"

Court of Civil Appeals for the Eighth Supreme Judicial District of Texas, at El Paso

JOSEPH BARNETT DOMINEY, JR.,
Appellant,
versus
No. 6209

LOUISE ELLEN DOMINEY,
Appellee.

Appeal from the Domestic Relations Court of Midland County, Texas
Date of entry: 6-14-72

ON MOTION FOR REHEARING

With remarkable candor and commendable brevity, the parties submitted this case on an agreed statement of facts. In their zeal to present the controlling questions with only the pertinent facts, no information was supplied concerning the disability of the appellant. With leave of court, a further stipulation of facts has been filed for consideration with the appellant's motion for rehearing. We now have before us the following:

"On October 1, 1966, appellant, Joseph Barnett Dominey, Jr., was eligible to receive retirement pay for voluntary retirement based on longevity of 24 years. On that date he was involuntarily retired from the Navy with dis-

ability retirement on account of a heart condition and other health problems, none of which are ascribed to any accident or other specific event.

"Upon retirement, appellant was entitled, solely at his option, to elect either to receive ordinary retirement pay with his longevity and his active-duty base pay at time of retirement being the only determining factors, or to receive disability retirement pay to be determined by a formula that multiplies the percentage of disability times the amount of his active-duty base pay at time of retirement. When the appellant computed his prospective retirement pay by each of these methods, he elected to accept disability retirement pay, because he would thereby receive more retirement pay.

"At the time of trial, appellant was receiving disability retirement pay from the United States Navy, and he has continued at all times since then to receive disability retirement pay from the Navy."

Considering these additional facts, we adhere to our original opinion. The payments though labeled "disability," still fit into the mould of an earned property right. They did not come to him as payment for damages suffered by an injury, but were a part of the bundle of benefits — pay, quarters, travel allowances, etc.

— earned by service. As such, they flowed into the community.

The motion for rehearing is overruled.

/s/ STEPHEN F. PRESLAR
STEPHEN F. PRESLAR,
Associate Justice

EXHIBIT "C"

Statutes:

Texas Family Code, Section 3.63. Division of Property

> In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

10 United States Code, Section 1201. Regulars and members on active duty for more than 30 days: retirement

> Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 270(b) of this title) for a period of more

than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under section 1401 of this title, if the Secretary also determines that —

(1) based upon accepted medical principles, the disability is of a permanent nature;

(2) the disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence; and

(3) either —

(A) the member has at least 20 years of service computed under section 1208 of this title; or

(B) the disability is at least 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination; and either —

(i) the member has at least eight years of service computed under section 1208 of this title;

(ii) the disability is the proximate result of performing active duty; or

(iii) the disability was incurred in line of duty in time of war or national emergency. Aug. 10, 1966, c. 1041, 70A Stat. 91, amended Sept. 2, 1958, Pub.L. 85-861, § 1(28) (A), 72 Stat. 1451; Sept. 7, 1962, Pub.L. 87-651, Title I, § 107(a), 76 Stat. 508.

10 United States Code, Section 1202. Regulars and members on active duty for more than 30 days: temporary disability retired list

Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 270(b) of this title) for a period of more than 30 days, would be qualified for retirement under section 1201 of this title but for the fact that his disability is not determined to be of a permanent nature the Secretary shall, if he also determines that accepted medical principles indicate that the disability may be of a permanent nature, place the member's name on the temporary disability retired list, with retired pay computed under section 1401 of this title. Aug. 10, 1956, c. 1041, 70A Stat. 92, amended Sept. 2, 1958, Pub.L. 85-861, § 1(28) (A), 72

Stat. 1451; Sept. 7, 1962, Pub.L. 87-651. Title I, § 107(a), 76 Stat. 508.

10 United States Code, Section 1401a(b). Adjustment of retired pay to reflect changes in Consumer Price Index

(b) The Secretary of Defense shall determine monthly the percent by which the index has increased over that used as the basis (base index) for the most recent adjustment of retired pay and retainer pay under this subsection. If the Secretary determines that, for three consecutive months, the amount of the increase is at least 3 per centum over the base index, the retired pay and retainer pay of members and former members of the armed forces who become entitled to that pay before the first day of the third calendar month beginning after the end of those three months shall, except as provided in subsection (c), be increased, effective on that day, by the per centum obtained by adding 1 per centum and the highest per centum of increase in the index during those months, adjusted to the nearest one tenth of 1 per centum.

Pub.L. 88-132, § 5(g) (1), Oct. 2, 1963, 77 Stat. 213, and amended Pub.L. 39-132, § 5(b), Aug. 21, 1965, 79 Stat. 547; Pub.L. 90-207, § 2(a) (1), Dec. 16, 1967, 81 Stat. 652; Pub.L. 91-179, § 1, Dec. 30, 1969, 83 Stat. 837.

10 United States Code, Section 1403. Disability retired pay: treatment under title 26

That part of the retired pay of a member of an armed force, computed under formula No. 1 or 2 of section 1401, or under section 1402(d), of this title on the basis of years of service, which exceeds the retired pay that he would receive if it were computed on the basis of percentage of disability is not considered as a pension, annuity, or similar allowance for personal injury, or sickness, resulting from active service in the armed forces, under section 104 (a) of title 26. Aug. 10, 1956, c. 1041, 70A Stat. 108.

10 United States Code, Section 1431. Election of annuity: members of armed forces

(a) This section applies to all members of the armed forces except —

(1) members whose names are on a retired list other than a list maintained under section 1376(a) of this title;

(2) cadets at the United States Military Academy, the United States Air Force Academy, or the Coast Guard Academy; and

(3) midshipmen.

(b) To provide an annuity under section 1434 of this title, a person covered by subsection (a) may elect to receive a reduced amount of the retired pay or retainer pay to which he may become entitled as a result of service in his armed force. Except as otherwise provided in this section, unless it is made before he completes nineteen years of service for which he is entitled to credit in the computation of his basic pay, the election must be made at least two years before the first day for which retired pay or retainer pay is granted. However, if, because of military operations, a member is assigned to an isolated station or is missing, interned in a neutral country, captured by a hostile force, or beleaguered or besieged, and for that reason is unable to make an election before completing nineteen years of that service, he may make the election, to become effective immediately, within one year after he ceases to be assigned to that station or returns to the jurisdiction of his armed force, as the case may be. A member of whom retired pay or retainer pay is granted retroactively, and who is otherwise eligible to make an election, may make the election within ninety days after receiving notice that such pay has been granted to him. An election made after the date of enactment of this amendment is not effective if —

(1) the elector dies during the first thirty-day period he is entitled to retired pay as a

result of a physical condition which led to his being granted retired pay under chapter 61 of title 10 with a disability of 100 per centum under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination of the per centum of his disability;

(2) the disability was not the result of injury or disease received in line of duty as a direct result of armed conflict; and

(3) his widow or children are entitled to dependency and indemnity compensation under chapter 13 of title 38 based upon his death.

(c) An election may be changed or revoked by the elector before the first day for which retired or retainer pay is granted. Unless it is made on the basis of restored mental competency under section 1433 of this title, or unless it is made before the elector completes nineteen years of service for which he is entitled to credit in the computation of his basic pay (in which case only the latest change or revocation shall be effective). the change or revocation is not effective if it is made less than two years before the first day for which retired or retainer pay is granted. The elector may, however, before the first day for which retired or retainer pay is granted, change or revoke his election (provided the change does not in-

crease the amount of the annuity elected) to reflect a change in the marital or dependency status of the member or his family that is caused by death, divorce, annulment, remarriage, or acquisition of a child, if such change or revocation of election is made within two years of such change in marital or dependency status.

(d) If an election made under this section is found to be void for any reason except fraud or willful intent of the member making the election, he may make a corrected election at any time within 90 days after he is notified in writing that the election is void. A corrected election made under this subsection is effective as of the date of the voided election it replaces. Aug. 10, 1956, c. 1041, 70A Stat. 108; Sept. 2, 1958, Pub.L. 85-861, § 33(a) (11), 72 Stat. 1565. As amended Oct., 4, 1961, Pub.L. 87-381, § 2, 75 Stat. 810; Aug. 13, 1968, Pub.L. 90-485, § 1(1), (2), 82 Stat. 761.

10 United States Code, Section 1434. Kinds of annuities that may be elected

(a) The annuity that a person is entitled to elect under section 1431 or 1432 of this title shall, in conformance with actuarial tables selected by the Board of Actuaries under section 1436(a) of this title, be the amount specified by the elector at the time of the election, but not more than 50 per centum nor less than 12½ per

centum of his retired or retainer pay, in no case less than $25. He may make the annuity payable —

(1) to, or on behalf of, the surviving spouse, ending when the spouse dies or remarries;

(2) in equal shares to, or on behalf of, the surviving children eligible for the annuity at the time each payment is due ending when there is no surviving eligible child; or

(3) to, or on behalf of, the surviving spouse, and after the death or remarriage of that spouse, in equal shares to, or on behalf of, the surviving eligible children, ending when there is no surviving eligible child.

(b) A person may elect to provide both the annuity provided in clause (1) of subsection (a) and that provided in clause (2) of subsection (a), but the combined amount of the annuities may not be more than 50 per centum nor less than 12½ per centum of his retired or retainer pay but in no case less than $25.

(c) An election of any annuity under clause (1) or (2) of subsection (a), or any combination of annuities under subsection (b), shall provide that no deduction may be made from the elector's retired or retainer pay after the last day of the month in which there is no bene-

ficiary who would be eligible for the annuity if the elector died. For the purposes of the preceding sentence, a child (other than a child who is incapable of supporting himself because of a mental defect or physical incapacity existing before his eighteenth birthday) who is at least eighteen, but under twenty-three years of age, and who is not pursuing a course of study or training defined in section 1435, of this title, shall be considered an eligible beneficiary unless the Secretary concerned approves an application submitted by the member under section 1436(b) (4) of this title. An election of an annuity under clause (3) of subsection (a) shall provide that no deduction may be made from the elector's retired or retainer pay after the last day of the month in which there is no eligible spouse because of death or divorce.

(d) Under regulations prescribed under section 1444(a) of this title, a person may, before or after the first day for which retired or retainer pay is granted, provide for allocating, during the period of the surviving spouse's eligibility, a part of the annuity under subsection (a) (3) for payment to those of his surviving children who are not children of that spouse. Aug. 10, 1956, c. 1041, 70A Stat. 109.

As amended Oct. 4, 1961, Pub.L. 87-381, § 3, 75 Stat. 811; Aug. 13, 1968, Pub.L. 90-485, § 1(3), 82 Stat. 751.

10 United States Code, Section 1435. Eligible beneficiaries

Only the following persons are eligible to be made the beneficiaries of, or to receive payments under, an annuity elected under this chapter by a member of the armed forces:

(1) The spouse of the member on the date when the member is retired or becomes entitled to retired or retainer pay or, if the member was already retired or entitled to retired or retainer pay on November 1, 1953, the spouse on that date

(2) The children of the member who are —

(A) unmarried;

(B) under eighteen years of age, or incapable of supporting themselves because of a mental defect or physical incapacity existing before their eighteenth birthday, or at least eighteen, but under twenty-three, years of age and pursuing a full-time course of study or training in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution;

(C) legitimate or adopted children of, or stepchildren in fact dependent for their support upon, the member;

(D) living on the date when the member is retired or becomes entitled to retired or retainer pay or if the member was already retired or entitled to retired or retainer pay on November 1, 1953, living on that date; and

(E) born on or before the date prescribed in clause (D).

For the purposes of clause (2) (B), a child is considered to be pursuing a full-time course of study or training during an interval between school years that does not exceed one hundred and fifty days if he has demonstrated to the satisfaction of the Secretary concerned that he has a bona fide intention of commencing, resuming, or continuing to pursue a full-time course of study or training in a recognized educational institution immediately after that interval. Aug. 10, 1956, c. 1041, 70A Stat. 110. As amended Aug. 13, 1968, Pub.L. 90-485, § 1(4), (5), 82 Stat. 752.

10 United States Code, Section 1440. Annuities not subject to legal process

No annuity payable under this chapter is assignable or subject to execution, levy, attach-

ment, garnishment, or other legal process. Aug. 10, 1956, c. 1041, 70A Stat. 111.

26 United States Code, Section 104. Compensation for injuries or sickness

(a) In general. — Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include —

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness;

(3) amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer); and

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in

the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22 U.S.C. 1081; 60 Stat. 1021).

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c) (1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee.

(b) Cross references. —

(1) For exclusion from employee's gross income of employer contributions to accident and health plans, see section 106.

(2) For exclusion of part of disability retirement pay from the application of subsection (a) (4) of this section, see section 402 (h) of the Career Compensation Act of 1949 (37 U.S.C. 272 (h)).

Aug. 16, 1954, c. 736, 63A Stat. 30; Sept. 8, 1960, Pub.L. 86-723, § 51, 74 Stat. 847; Oct. 10, 1962, Pub.L. 87-792, § 7(d), 76 Stat. 829.

38 United States Code, Section 3101. Nonassignability and exempt status of benefits

(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.

(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Veterans' Administration and relating to veterans, their estates, or their dependents, of

any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or his estate; or (2) any beneficiary or his estate except amounts due the United States by such beneficiary or his estate by reason of overpayments or illegal payments made under such laws to such beneficiary or his estate or to his dependents as such. If the benefits referred to in the preceding sentence are insurance payable by reason of yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance issued by the United States, the exemption provided in this section shall not apply to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness is in the form of liens to secure unpaid premiums or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits.

(c) Notwithstanding subsection (a), payments of benefits under laws administered by the Veterans' Administration shall not be exempt from levy under subchapter D of chapter 64 of the Internal Revenue Code of 1954 (relating to seizure of property for collection of taxes). Pub.L. 85-857, Sept. 2, 1958, 72 Stat. 1229.

38 United States Code, Section 3105. Waiver of retired pay

Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if he were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of his retired or retirement pay as is equal in amount to such pension or compensation. To prevent duplication of payments, the department with which any such waiver is filed shall notify the Veterans' Administration of the receipt of such waiver, the amount waived, and the effective date of the reduction in retired or retirement pay. Pub.L. 85-857, Sept. 2, 1958, 72 Stat. 1231. As amended Pub.L. 91-621, § 6(a) (3), Dec. 31, 1970, 84 Stat. 1864.

38 United States Code, Section 3107. Apportionment of benefits

(a) All or any part of the compensation, pension, or emergency officers' retirement pay payable on account of any veteran may —

(1) if the veteran is being furnished hospital treatment, institutional, or domiciliary care by the United States, or any political subdivision thereof, be apportioned on behalf of his wife, children, or dependent parents; and

(2) if the veteran is not living with his wife, or if his children are not in his custody, be apportioned as may be prescribed by the Administrator.

(b) Where any of the children of a deceased veteran are not in the custody of the veteran's widow, the pension, compensation, or dependency and indemnity compensation otherwise payable to the widow may be apportioned as prescribed by the Administrator.

(c) If a veteran is not living with his wife, or if any of his children are not in his custody, any subsistence allowance payable to him under chapter 31 of this title may be apportioned as may be prescribed by the Administrator. Pub.L. 85-857, Sept. 2, 1958, 72 Stat. 1231.

APPENDIX "D"

IN THE COURT OF DOMESTIC RELATIONS OF MIDLAND COUNTY, TEXAS

No. DR-1985

LOUISE ELLEN DOMINEY

versus

JOSEPH BARNETT DOMINEY, JR.

DEFENDANT'S MOTION FOR NEW TRIAL

JOSEPH BARNETT DOMINEY, JR., the Defendant in the above entitled and numbered cause, makes and files this his Motion for New Trial, moving the Court to set aside the Judgment heretofore rendered, signed and entered, and to grant a new trial herein on the following grounds, to-wit:

* * * *

2.

The Court has erred in treating as property, which may be the subject of present division between husband and wife on the occasion of divorce, whatever the Defendant might hope to expect to receive in the future from the United States of America because of the Defendant's service in the United States Navy, whether such payments might be deemed disability payments, retirement payments, or disability retirement payments.

* * * *

4.

The Court has erred in failing to hold and to recognize that it is the law of the United States of America, and not the law of the State of Texas, which governs entitlements, rights and privileges in and with respect to payments which might be made in the future to the Defendant by the United States of America because of his service in the United States Navy, whether such payments might be deemed disability payments, retirement payments, or disability retirement payments.

* * * *

12.

Perforce of the Supremacy Clause, Article 6, Clause 2, of the Constitution of the United States, the Plaintiff has no rights whatsoever in or on account of that which the United States of America may choose to pay the Defendant in the future on account of his service to the United States, and the Court has erred in holding that the Plaintiff has a vested right therein and thereto.

WHEREFORE, the Defendant prays that the Court grant this Defendant a new trial.

ORDER OVERRULING DEFENDANT'S MOTION FOR NEW TRIAL

On this the 1st day of March, 1971, the Court brought on to be heard and considered the Defendant's Motion for New Trial heretofore filed in the captioned proceed-

ing, and after having heard and considered the same, it is considered ORDERED, ADJUDGED and DECREED that said Motion for New Trial be, in all things, overruled.

RENDERED, SIGNED and ENTERED the day and year first above written.

/s/ Joseph H. Mims
(Judge Presiding)

No. 6209

In The
COURT OF CIVIL APPEALS
FOR THE EIGHTH SUPREME JUDICIAL DISTRICT
OF TEXAS
At El Paso

JOSEPH BARNETT DOMINEY, JR.,
Appellant,

versus

LOUISE ELLEN DOMINEY,
Appellee.

BRIEF FOR APPELLANT

---

* * * *

STATEMENT OF THE POINTS OF ERROR UPON WHICH THE APPEAL IS PREDICATED

* * * *

TWO

The error of the Court in treating as property, which may be the subject of present division between husband and wife on the occasion of divorce, whatever the Appellant might hope or expect to receive in the future from the United States of America because of the Appellant's service in the United States Navy, whether such payments might be deemed disability payments, retirement payments, or disability retirement payments. (Under Assignment of Error No. 2, TR 47).

* * * *

FOUR

The error of the Court in failing to hold and to recognize that it is the law of the United States of America, and not the law of the State of Texas, which governs entitlements, rights and privileges in and with respect to payments which might be made in the future to the Appellant by the United States of America because of his service in the United States Navy, whether such payments might be deemed disability payments, retirement payments, or disability retirement payments. (Under Assignment of Error No. 4, TR 48).

* * * *

TWELVE

Perforce of the Supremacy Clause, Article 6, Clause 2, of the Constitution of the United States, the Appellee has no rights whatsoever in or on account of that which the United States of America may choose to pay the Appellant in the future on account of his services to the United States, and the Court has erred in holding that the Appellee has a vested right therein and thereto. (Under Assignment of Error No. 12, TR 50).

REPLY BRIEF

FILE COPY

FILED
OCT 7 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-406

JOSEPH BARNETT DOMINEY, JR.,
Petitioner,

versus

LOUISE ELLEN DOMINEY,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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Does state law approving a divorce judgment which awards one-half of a Navy officer's disability retirement pay entitlement which awards one-half of a Navy him to pay her such an amount of money monthly as he receives it, conflict with United States law so as to require nullification of the state law under the Supremacy Clause of the Constitution?

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A. There is no federal question of substance involved in this case, because the holding of the Texas Court of Civil Appeals does not conflict with United States law so as to require striking down that holding.

B. Petitioner does not here question the essential fairness of the financial provisions of the trial court's judgment

C. It would be fundamentally unjust to render Navy retirement pay categorical-

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ly unavailable for the welfare and support of the retiree's dependents afer divorce.

D. The Petitioner complains of the divorce judgment financial provisions which are favorable to his spouse, while he accepted and retained under his total and unlimited dominion (and may have disposed of) some of the benefits awarded to him under the financial provisions favorable to him. The Petitioner is therefore not before this Court with "clean hands."

E. The Petitioner has failed to sustain the burden of showing a sound, compelling reason to grant the writ.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72-406

JOSEPH BARNETT DOMINEY, JR.,
Petitioner,

versus

LOUISE ELLEN DOMINEY,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Louise Ellen Dominey respectfully urges the Court to deny the Petition for Writ of Certiorari filed by the Petitioner herein.

I. OPINIONS OF THE COURT BELOW

Petitioner has correctly presented the matter in his petition.

II. JURISDICTIONAL STATEMENT

Respondent contends that the provisions of 28 U.S.C., Section 1257(3) do not confer jurisdiction upon the Court in this case, because none of the criteria set forth in the statute are met.

III. QUESTION PRESENTED FOR REVIEW

Does state law approving a divorce judgment which awards one-half of a Navy officer's disability retirement pay entitlement to his spouse, and which requires him to pay her such an amount of money monthly as he receives it, conflict with United States law so as to require nullification of the state law under the Supremacy Clause of the Constitution?

IV. CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

Although the Petitioner appears to assert that twelve United States statutes are involved in this case as being in conflict with the holding of the Texas court, the Respondent denies that any of the listed statutes conflicts with the Texas holding. Since the case involves no conflict between United States law and Texas law, it follows that neither is the Supremacy Clause of the Constitution involved.

V. STATEMENT OF THE CASE

Petitioner fairly stated the case in his Petition. However, some additional statements are needed.

Upon retirement, Petitioner was entitled, solely at his option, to elect either to receive ordinary retirement pay with his longevity and his active-duty base pay at the time of retirement being the only determining factors, or to receive disability retirement pay to be determined by a formula that multiplies the percentage of disability times the amount of his active-duty base pay at time of retirement. When the Petitioner computed his prospective retirement pay by each of these methods, he elected to accept disability retirement pay, because he would thereby recive more retirement pay.

Following entry of the trial court's judgment, Petitioner left in the registry of the trial court much of the property awarded to him, but he also took and possessed and exercised total unrestricted dominion over other properties which were awarded to him.

Petitioner's appeal of this case has been based solely on his claim of conflict with federal law.

VI. REASONS FOR DENYING THE PETITION

A. There is no federal question of substance involved in this case, because the holding of the Texas Court of Civil Appeals does not conflict with United States law so as to require striking down that holding.

B. Petitioner does not here question the essential fairness of the financial provisions of the trial court's judgment.

C. It would be fundamentally unjust to render Navy retirement pay categorically unavailable for the welfare and support of the retiree's dependents after divorce.

D. The Petitioner complains of the divorce judgment financial provisions which are favorable to his spouse, while he accepted and retained under his total and unlimited dominion (and may have disposed of) some of the benefits awarded to him under the financial provisions favorable to him. The Petitioner is therefore not before this Court with "clean hands."

E. The Petitioner has failed to sustain the burden of showing a sound, compelling reason to grant the writ.

VII. ARGUMENT

A. There is no federal question of substance involved in this case, because the holding of the Texas Court of Civil Appeals does not conflict with United States law so as to require striking down that holding.

Petitioner's argument lists twelve statutes which he considers to bear upon this case, but he has not indicated how he considers that one of them conflicts specifically with the Texas Court of Civil Appeals holding in this case.

However, Petitioner has made it clear that the holdings in the cases of *Free v. Bland,* 369 U. S. 663, 8

L.Ed.2d 180, 82 S.Ct. 1089 (1962), and *Wissner v. Wissner*, 338 U.S. 655, 94 L.Ed. 424, 70 S.Ct. 398 (1950), are those upon which he relies to suggest a conflict between Texas and United States law in this case. So it might be helpful to examine these cases to determine their applicability, if any, to the present case.

In *Free v. Bland*, the dispute arose over title to certain United States savings bonds. Mr. and Mrs. J. W. Free were Texans who, during their marriage, bought savings bonds with community funds, and directed that the bonds be issued to "Mr. *or* Mrs." Free. When Mrs. Free died, leaving her son as principal beneficiary of her will, her widower claimed the bonds under the U. S. Treasury regulations, which specified that such bonds pass to the surviving named co-owner, while her son claimed that her one-half community interest in the bonds passed under her will. The Supreme Court held for the widower, saying that there *was* a federal law involved, and that it *did* specifically and directly and irreconcilably conflict with the Texas law, and that the federal law must therefore prevail.

The case of *Wissner v. Wissner* dealt with the proceeds of a policy of National Service Life Insurance. Wissner, an Army officer, died owning the policy of which he had designated his mother the sole beneficiary. His widow would have been, under the community property law of California, entitled to one-half the proceeds of the policy. The Court held that the federal statute, which gave the insured the unequivocal right to select beneficiaries, being in specific opposition to the state law, must prevail, so the decedent's

mother was awarded the proceeds of the life insurance policy.

The general rule or test concerning conflict between state and federal laws is that the state law must yield where there is a conflict so direct and positive that the two acts cannot be reconciled or consistently stand together. *Kelly v. Washington*, 302 U.S. 1, 10; 82 L.Ed.3; 58 S.Ct. 87, 92. Let us examine the three cases against that test.

In *Free v. Bland* and *Wissner v. Wissner*, the federal and state law were in such diametric conflict that both laws could not survive:

> In the *Free* case, to have upheld state law that a 50% interest in bonds passed under the will would have struck down and rendered null and void the federal law which said that 100% of the bonds should pass to the named survivor.
>
> In the *Wissner* case, to have upheld state law that the widow should receive 50% of the life insurance benefits would have struck down and rendered null and void the federal law which said that 100% of the benefits should pass to the named beneficiary.
>
> In the Dominey case, to hold that Mrs. Dominey may receive 50% of the retirement pay will not strike down nor render null or void any federal statute or regulation.

In the Dominey case, the federal and state laws stand together so that each may be enforced without doing violence to the other. Enforcing the one does not thwart the other.

Hence there is no conflict between the federal and state laws in this case. They are compatible with one another and they are jointly enforceable.

Petitioner has referred to certain government funds that are exempt from attachment, levy and seizure under legal or equitable process. It should be noted that this case does not in any way involve a claim to the right of attachment, levy or seizure, but on the contrary, such retirement funds are dealt with by the trial court judgment only *after* they have been paid to the retiree. (Appenidx "A" shows the trial court's judgment as it pertains to the retirement pay.)

Incidentally, there are indications that the prohibition against attachment, levy, seizure, garnishment or other similar process, even when enforcement is sought against the government itself, is not applicable to prohibit the performance of domestic financial duties. *Voelkel v. Tohulka*, 236 Ind. 588, 141 N.E.2d 344, certiorari denied 355 U. S. 891, 78 S.Ct. 263, 2 L.Ed.2d 189; *Schlaefer v. Schlaefer*, 112 F.2d 117 (U.S. Ct. of Appeals, Dist. of Columbia, 1940).

Petitioner appears to suggest that the trial court's reference to the retiree's "vested rights" in connection with his future retirement benefits, is in conflict with a federal statute, although he has specified no such

statute. The right's defeasibility at the instance of the United States Congress does not destroy the "vested" nature of the right in the context in which it is used in this case.

B. Petitioner does not here question the essential fairness of the financial provisions of the trial court's judgment.

Petitioner has never during this appeal claimed that the financial provisions of the judgment were in anyway unfair or unjust to him, but rather he claims only that it conflicts with federal law. In short there is no assertion by Petitioner that the failure to rule favorably to him will result in any injustice to him.

C. It would be fundamentally unjust to render retirement pay categorically unavailable for the welfare and support of the retiree's dependents after divorce.

Petitioner, in stating that Congress "has so far declined to" take care of divorced spouses of servicemen, implies the contention that the retiree should never be required to help take care of his divorced spouse, if to do so would require that he dip into his retirement pay. Bearing in mind that a military couple might retire after 30 years of marriage and military service with no income or property at all except, say, $1,500.00 per month in retirement pay, it is difficult to believe that Congress had clearly in mind a plan to aid such a retiree in a scheme to drive his wife from his home, leave her a destitute charge on society,

while he received $18,000.00 per year. It is difficult to believe that Congress really intended to universally preclude payments from a retiree to his divorced spouse, because if it had so intended, it could so very easily have said so in the statute.

D. The Petitioner complains of the divorce judgment financial provisions which are favorable to his spouse, while he accepted and retained under his total and unlimited dominion (and may have disposed of) some of the benefits awarded to him under the financial provisions favorable to him. The Petitioner is therefore not before this Court with "clean hands."

The courts of Texas have regularly held that when a divorce judgment is entered, neither party may prosecute an appeal as to the property division if such appellant has voluntarily accepted some of the financial benefits of the judgment. *Carle v. Carle*, 234 S.W.2d 907 (1950). This issue was submitted by respondent on appeal to the Texas Court of Civil Appeals, but since that appellate court upheld this respondent's position on other grounds, it did not comment in any way on this issue.

E. The Petitioner has failed to sustain the burden of showing a sound, compelling reason to grant the writ.

It is respectfully submitted that perhaps the strongest reason for not granting the writ of certiorari in this case is that the Petitioner has not shown a really

strong reason for doing so. Petitioner fails to show that any injustice will result from sustaining Respondent, or even that adoption of any of the principles advanced by Petitioner are necessary to justice in future cases involving related situations.

Petitioner states that if the Texas courts are sustained, 100% of the retirement income could be ordered paid by the retiree to his former spouse, and he implies that this would be bad. In the first place, it is not an issue in this case because the court ordered only an equal division of the income. Secondly, if it is "bad," the Congress may surely enact legislation to prevent its occurrence.

Petitioner further states that an extension of the state court holding in this case would entitle retiree's former spouse to assign interests to such people as retiree's mother-in-law, or brother-in-law, or to the spouse's creditors, and Petitioner implies that this would be bad. Once again, such a state of facts is not now before this Court, so the Petitioner is asking that the Court deal with the case on the basis of hypothetical facts instead of the real ones. And once again, if such assignments are "bad," then the Congress may surely enact legislation to prevent them.

So far the Congress has not enacted any statutes that are in conflict with the state law involved. Therefore, the Respondent's position herein is legally valid, as well as fair and just.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Of Counsel

CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of October, A. D. 1972.

APPENDIX "A"

IN THE COURT OF DOMESTIC RELATIONS OF MIDLAND COUNTY, TEXAS

No. DR-1985

LOUISE ELLEN DOMINEY

versus

JOSEPH BARNETT DOMINEY, JR.

JUDGMENT OF DIVORCE

On September 22, 1969, came on to be heard the above styled and numbered cause wherein Louise Ellen Dominey is plaintiff and Joseph Barnett Dominey, Jr. is defendant, and the defendant having been duly served with citation and appearance day having passed, the parties came in person and with their attorneys and announced ready for trial. The Court finds that the plaintiff's pleadings meet all the requisites of the law. A jury having been demanded, a jury of twelve persons was selected.

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SECTION III.

It further appears, and the Court so finds, that, on account of the defendant's service in the United States Navy, all of which service occurred while the defendant was domiciled in Texas, the defendant is entitled to receive from the United States government U. S. Navy retired, and/or disability retired, pay benefits, (hereinafter called "Navy retired pay", whether referring to regular, or non-disability, retired pay benefits or to disability retired pay benefits.)

IT IS ORDERED, ADJUDGED and DECREED that, beginning with the payment received by the defendant on or about January 1, 1971, the plaintiff shall own and hold as her property one-half (1/2), and defendant shall own and hold as his property one-half (1/2), of the gross Navy retired pay entitlement, as the same is now constituted and as it may from time to time be increased or decreased in amount by the U. S. government.

It is further ordered that the defendant shall pay and deliver over to the plaintiff in Midland County, Texas, by postal or bank money order a sum of money equal to one-half (1/2) of the gross Navy retired pay on or before the fifth (5th) day after its receipt by the defendant.

In order that plaintiff may know at all times of any changes or proposed changes in the formula for Navy retired pay and/or the status thereof, it is further or-

dered that the defendant shall send to plaintiff a facsimile copy of each voucher accompanying a Navy retired pay check, and all other memoranda, letters and forms relating to the status or proposed status of the retired pay account and/or of his duty status in the Navy, and a copy of all requests, memoranda, letters to, and written summaries of oral communication with U. S. government authorities which might affect the retired pay account. The defendant shall mail such copies and/or summaries to plaintiff within five (5) days of the date that defendant so receives or writes or orally communicates.

In the event that the defendant shall perform any act or permit any omission which shall terminate, interrupt, postpone or reduce, or shall contribute to terminating, interrupting, postponing or reducing the amount of the gross Navy retired pay (other than returning to extended active duty in the United States Navy), then the defendant shall nevertheless pay to the plaintiff a sum of money each month, payable on or before the fifth (5th) day of each such month, equal to one-half (1/2) of the Navy retired pay which defendant would have been entitled to receive but for such act or omission of the defendant. In the event that the defendant shall return to extended active duty in the United States Navy, then when he shall return to retired status, the payments by defendant to plaintiff hereunder shall resume and continue, but the amount due plaintiff shall be computed as one-half (1/2) of the maximum gross Navy retired pay which the defendant would have been entitled to receive from the

U. S. government if he had never returned to active duty.

The parties' present mailing addresses are as follows:

Dr. Joseph B. Dominey, Jr.
Travis State School
P. O. Box 430
Austin, Texas 78700

Mrs. Louise R. Dominey
P. O. Box 6064
Midland, Texas 79701

It is ORDERED that the defendant shall send to the plaintiff at her said mailing address, (subject to change of same as provided hereafter) all payments, notices and other correspondence required or contemplated by this judgment. The defendant is hereby ORDERED to notify the plaintiff of any change of his residence address by sending her written notice thereof to the said post office address above within ten (10) days after his change of such address. And the plaintiff is ORDERED to notify the defendant of any change of her mailing address given above at least ten (10) days prior to the effective date of such address change. All notices and correspondence required hereunder between the plaintiff and the defendant shall be by certified or registered U. S. Mail, with return receipt requested.

The orders in Section III hereof shall have all the full force and effect of permanent mandatory injunctions, and they shall be enforceable by this Court, or its successor, in continuing jurisdiction, by contempt of court proceedings and by all other appropriate equitable and legal remedies of the plaintiff.

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SECTION VII.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff and defendant shall execute such letters, assignments, endorsements, applications and income tax returns, provided for above, and they shall execute any and all other instruments and perform any and all other acts and deeds as may be reasonably necessary or appropriate to carry out the property and financial provisions hereinabove set forth.